No. 91-2045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

R. GORDON DARBY, *et al.*,
Petitioners,

v.

HENRY G. CISNEROS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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STATEMENT OF THE CASE

It is uncontested before this Court that the administrative sanctions imposed upon petitioners (hereafter, "Mr. Darby") were unlawful. The district court concluded that "the debarment in this case was not rationally connected to the factual findings of the ALJ, and was further in conflict with the prohibition against imposing debarment for punitive reasons." Pet. App. B at 17a. Although respondents (hereafter, "the government") initially noted an appeal of this ruling, they subsequently abandoned that issue. On appeal to the Fourth Circuit, the government challenged only the district court's refusal to dismiss Mr. Darby's suit on exhaustion grounds. Accordingly, the only issue before this Court is whether Mr. Darby should have been denied the relief to which he was otherwise entitled under the Administrative Proce-

dure Act ("APA") because of his alleged failure to exhaust administrative remedies. *See Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, ——, 111 S. Ct. 913, 918 (1991).

Nonetheless, the government strives to influence the Court's decision by suggesting that the agency's sanctions were warranted. Its brief details in highly partisan fashion the facts found and conclusions reached by the ALJ in support of the flawed decision to debar Mr. Darby, Resp. Br. 2-7, while ignoring the judicious summary of the district court that is now the law of this case. Indeed, in its zeal to discredit Mr. Darby's actions, the government improperly introduces matters outside the record which have no place before this Court.[1] *Russell v. Southard*, 53 U.S. (12 How.) 139, 158-59 (1851).

ARGUMENT

A. Section 10(c) of the Administrative Procedure Act Codifies the Exhaustion Doctrine for Purposes of Judicial Review Under the Act

The issue presented in this case is whether Mr. Darby can be denied judicial review under the APA of an arbitrary and unlawful administrative sanction because he did not pursue an intra-agency appeal that was not required by statute or agency rule. Mr. Darby contends that the answer is no, and that this issue is controlled by Section 10(c) of the APA, which provides that:

[1] Thus, the government injects in its statement of the case that Lonnie Garvin, the mortgage banker who devised the financing plan which led to Mr. Darby's debarment, "has . . . been debarred twice for violating HUD requirements." Resp. Br. 4 n.2. Not only is this allegation outside the record in this case, but it is misleading as well. The government omits that both of these debarments occurred *after* Mr. Darby's debarment; that the first debarment—presently on appeal to the district court—was based on Mr. Garvin's own use of the financing plan and was a companion to the debarment action against Mr. Darby; and that the second debarment was based on Mr. Garvin's alleged violation of the terms of the first debarment.

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. *Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.*

5 U.S.C. § 704 (emphasis added).

Mr. Darby's position is straightforward: Section 10(c) of the APA codifies the exhaustion doctrine for purposes of judicial review under the APA, and specifies the circumstances under which pursuit of an administrative appeal can be a precondition to judicial review. The statute mandates that an agency's procedural ground rules be spelled out in advance for all to see. It freely permits either the agency (by appropriate rule) or Congress (by statute) to require exhaustion of intra-agency appeals. However, absent the imposition of such a requirement, the statute entitles a litigant aggrieved by a final agency decision to seek judicial relief without first exhausting theoretically available, but non-mandatory, administrative remedies.

Unable to refute this argument on the merits, the government resorts to misstating Mr. Darby's position so that it can attack an argument which Mr. Darby has never made. Thus, the government repeatedly and erroneously claims that Mr. Darby is arguing that Section 10(c) eradicates the exhaustion doctrine with respect to actions under the APA. *See* Resp. Br. 13 ("Petitioners' assertions that Section 10(c) . . . rendered the exhaustion doctrine inapplicable in any action for judicial review

under the APA is mistaken."); *id.* at 16 ("[P]etitioners' claim that the exhaustion doctrine no longer applies in APA actions . . . ."); *id.* at 18 ("The core premise of petitioners' theory is that Section 10(c) repudiated the exhaustion doctrine . . . ."). Quite to the contrary—and as the government well knows—Mr. Darby contends that Section 10(c) *codified* the exhaustion doctrine for purposes of judicial review under the APA.

The government denies that Section 10(c) even deals with exhaustion of administrative remedies, and argues that it addresses only the distinct (although related) issue of finality. *See* Resp. Br. 10, 15, 22. This remarkable contention is contradicted by the statutory language, the relevant legislative history, and this Court's decisions.

There is no question that the first two sentences of Section 10(c) address the issue of finality as a prerequisite to judicial review of administrative action. Accordingly, this Court has cited Section 10(c) repeatedly with respect to the finality requirement. *See, e.g., Franklin v. Massachusetts*, —— U.S. ——, ——, 112 S. Ct. 2767, 2773 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882 (1990); *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980); *CAB v. Delta Air Lines*, 367 U.S. 316, 327 n.9 (1961).

However, the third and last sentence of Section 10(c) unmistakably addresses the issue of exhaustion. It provides that:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The government makes the facile argument that "[Section 10(c)] contains no reference to the term 'exhaustion,' and provides only that agency action must be final to be 'subject to judicial review.'" Resp. Br. 10. This contention cannot withstand analysis. If the only purpose of Section 10(c) was to establish the requirement of finality, then the third sentence of the provision would be superfluous and inexplicable. In fact, the third sentence presupposes the existence of a *final* agency action and proceeds to address whether there are any additional *procedural* prerequisites to judicial review. This is the essence of exhaustion, not finality.

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (1985).

The legislative history of Section 10(c) confirms that the third sentence of the provision addresses the issue of exhaustion. When Congress was considering the enactment of the APA, the Department of Justice advised it that:

> The last sentence [of Section 10(c)] makes it clear that the doctrine of exhaustion of administrative remedies with respect to finality of agency action is intended to be applicable only (1) where expressly required by statute (as, for example, is provided in 49 U.S.C. 17(9)), or (2) where the agency's rules require that decisions by subordinate officers must be appealed to superior agency authority before the decision may be regarded as final for purposes of judicial review.

S. Rep. No. 752, 79th Cong., 1st Sess. 44 (1945), *reprinted in* Senate Judiciary Comm., 79th Cong., 2d Sess., *Administrative Procedure Act: Legislative History* 185, 230 (Comm. Print 1946) ("APA Leg. Hist.").[2] The government now seeks to disavow its own contemporaneous construction of Section 10(c).

Moreover, the Court itself has recognized explicitly that "the primary thrust of § [10(c)] was to codify the exhaustion requirement." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). The government conspicuously ignores this decision in arguing to the contrary.

B. The 1976 Amendment to Section 10(a) of the Administrative Procedure Act Which Eliminated the Defense of Sovereign Immunity Has No Bearing Whatsoever on Exhaustion of Administrative Remedies

The government next contends that the 1976 amendment to Section 10(a) of the APA, 5 U.S.C. § 702, which eliminated the defense of sovereign immunity, somehow refutes Mr. Darby's construction of Section 10(c). Resp. Br. 16-18. This argument is a red herring.

The purpose of the 1976 amendment was to remove the defense of sovereign immunity as a bar to judicial review of administrative action under the APA. In order to underscore the limited scope of the amendment, Congress

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[2] A commentator who reviewed the legislative history of Section 10(c) after the enactment of the APA reached the same conclusion about its import with respect to the issue of exhaustion.

> As originally introduced 10(c) said nothing as to whether an administrative appeal was a condition precedent to judicial review. In the final draft it was provided that an administrative appeal would not be necessary to exhaust administrative remedies unless the board adopted a rule that during the pendency of the appeal the effectiveness of the order would be automatically stayed. This was when the substitution occurred. *Compare* the original draft, SEN. Doc. No. 248, 79th Cong., 2d Sess. 160 (1946), *with* the final draft. *Id.* at 8.

Comment, *"Final" Orders: Section 10(c) of the APA*, 6 Stan. L. Rev. 531, 535 n.29 (1954).

included the following provisos in the revised statutory language:

> Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702. In the accompanying legislative history, Congress listed failure to exhaust administrative remedies as one of a number of independent limitations on judicial review that would remain unchanged by the amendment. *See* H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9-10, 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6130, 6132; S. Rep. No. 996, 94th Cong., 2d Sess. 9, 11 (1976).

The government argues that "Congress's express recognition of the continuing vitality of the exhaustion doctrine in 1976—and its enactment of statutory language recognizing that courts may continue to apply such traditional doctrines in APA cases—is fundamentally at odds with petitioners' construction of Section 10(c)." Resp. Br. 18. However, there are two fallacies in this argument. First, contrary to the government's claim, Mr. Darby does not contend that Congress repudiated the exhaustion doctrine in Section 10(c). Thus, the "continuing vitality" of the exhaustion doctrine in APA cases is fully consistent with Mr. Darby's construction of Section 10(c).

Furthermore, while Congress provided that limitations on judicial review other than sovereign immunity were unaffected by the 1976 amendment to Section 10(a), it did not purport to address the substance of those limitations. To the contrary, Congress emphasized that the 1976 legislation had no bearing on those other limitations, including failure to exhaust administrative remedies. It is impossible to glean any guidance from the amendment

or from its administrative history about how exhaustion requirements are to be derived or applied in APA actions.[3]

C. Federal Courts Cannot Impose Exhaustion Requirements in Derogation of Section 10(c)

The government implicitly concedes that Mr. Darby fulfilled all of the preconditions to judicial review set forth by Congress in Section 10(c). Nonetheless, it maintains that the federal courts have a reservoir of authority to postulate additional exhausiton requirements on an *ad hoc* basis and to deprive litigants of judicial review because of their failure to satisfy these judicially-created conditions. Thus, the government asserts:

> Section 10(c) does not *preclude* review of petitioners' claim. But nor does it *require* review under circumstances where courts would traditionally impose an exhaustion requirement in the interests of administrative and judicial efficiency.

Resp. Br. 10 (emphasis in original); *see also id.* at 15-16.

This tortured construction of Section 10(c) would render the statute a congressional exercise in futility by leaving the courts free to deprive a litigant of judicial review notwithstanding the explicit provisions of the statute. Indeed, the government's construction would stand Section 10(c) on its head and would transform it from a provision which removes obstacles to judicial review, *see Bowen v. Massachusetts*, 487 U.S. at 904, into a trap for unwary litigants who assume that the statute

[3] Moreover, any opinion Congress might have expressed in 1976 about the meaning of Section 10(c) would provide an extremely hazardous basis for construing a statute that was enacted thirty years earlier. *See, e.g., Wright v. West*, —— U.S. ——, —— n.9, 112 S. Ct. 2482, 2492 n.9 (1992). "[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

means what it says. Neither logic nor the law supports this unjust result.

As a matter of logic, the government's construction of Section 10(c) is nonsensical. Why would Congress have bothered to enact the last sentence of the statute if exhaustion issues in APA cases still were to be decided by the courts on an *ad hoc* basis and, moreover, if the courts were free to disregard or even negate the statutory provisions? Why would Congress have commanded agencies to spell out their exhaustion requirements in advance while simultaneously permitting them to sandbag litigants with unforeseen exhaustion defenses in court? The answer, of course, is that Congress never would have engaged in such an exercise. This explains why the government clings to the untenable position that Congress did not address the issue of exhaustion in Section 10(c). Once it is acknowledged that the statute does address exhaustion, then the government's argument that courts remain free to impose additional exhaustion requirements in APA actions crumbles.

As a matter of law, the government's argument ignores the constitutional imperative that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *McCarthy v. Madigan*, —— U.S. ——, ——, 112 S. Ct. 1081, 1087 (1992) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.), 264, 404 (1821)). The APA explicitly provides, in Section 10(a), that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is *entitled* to judicial review thereof." 5 U.S.C. § 702 (emphasis added). Accordingly, this Court has stated that

> Any person 'adversely affected or aggrieved' by agency action, see § 702, . . . is entitled to 'judicial review thereof,' as long as the action is a 'final agency action for which there is no other adequate remedy in a court,' see § 704.

Heckler v. Chaney, 470 U.S. 821, 828 (1985); *see also Webster v. Doe*, 486 U.S. 592, 599 (1988).[4]

Furthermore, the government's position is flawed as a matter of statutory construction. Engaging in a selective reading of the legislative history of Section 10(c), the government makes much of several comments that the provision was intended to state existing law. The government then leaps from this premise to the conclusion that "it is highly unlikely that Section 10(c) was intended to deprive courts of their traditional authority to require exhaustion of administrative remedies (including appeals) when the needs of administrative automony and judicial efficiency outweigh private interests in early access to a judicial forum." Resp. Br. 20. However, this argument is nothing more than an exercise in bootstrapping.

The government fails to acknowledge that, while the provisions of Section 10(c) indeed were consistent with existing law,[5] Congress plainly intended that the statutory provisions henceforth would govern exhaustion issues to the exclusion of any conflicting authority. This is made abundantly clear by considering the full text of Attorney General Clark's commentary about Section 10(c).

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[4] Contrary to the government's assertion, it is not Mr. Darby's theory that "Section 10(c) mandates immediate judicial review of all final agency decisions." Resp. Br. 25. Mr. Darby contends that Section 10(c) governs the issue of exhaustion—*i.e.* whether a litigant may be denied judicial review because of an alleged procedural default on his/her part. Mr. Darby does not contend that Section 10(c) resolves distinct issues such as ripeness. As discussed more fully below, the construction of Section 10(c) propounded by Mr. Darby here is fully consistent with this Court's ripeness jurisprudence, including the Court's decision in *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967).

[5] *See Levers v. Anderson*, 326 U.S. 219 (1945); *Banton v. Belt Line Ry.*, 268 U.S. 413, 416-17 (1925); *United States v. Abilene & S. Ry.*, 265 U.S. 274, 280-82 (1924); *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 48 (1923).

> Section 10(c): This subsection states (subject to the provisions of section 10(a)) the acts which are reviewable under section 10. *It is intended to state existing law.* The last sentence makes it clear that *the doctrine of exhaustion of administrative remedies with respect to finality of agency action is intended to be applicable only (1) where expressly required by statute* (as, for exampte, is provided in 49 U.S.C. 17(9)), *or (2) where the agency's rules require that decisions by subordinate officers must be appealed to superior agency authority before the decision may be regarded as final for purposes of judicial review.*

S. Rep. No. 752, 79th Cong., 1st Sess. 44 (1945), *reprinted in* APA Leg. Hist. at 230 (emphasis added). Thus, contrary to the government's suggestion, there is every reason to believe that exhaustion requirements are to be applied "only" in conformance with Section 10(c) and that the courts have no residual authority to impose additional exhaustion requirements.

This conclusion is reinforced by a functional analysis of Section 10(c). The statute explicitly provides for judicial review of final agency actions if there is no mandatory administrative appeal process. Further, it ordains that the administrative appeals are mandatory for exhaustion purposes only if they are required by statute or agency regulation. The statute provides that, for purposes of judicial review under the APA, exhaustion requirements can be established only by Congress or by the agencies; only in advance; and only through rules of general applicability. The "rule of judicial administration" promulgated by the Fourth Circuit in this case is the antithesis of Section 10(c) on all these counts.

This Court recently confronted a similar issue in *Astoria Federal Savings & Loan Ass'n v. Solimino*, —— U.S. ——, 111 S. Ct. 2166 (1991). The question presented in that case was whether federal courts should grant preclusive effect to state administrative findings with

respect to age-discrimination claims. The Court explained the crux of that issue as follows:

> Courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand. In this context, the question is not whether administrative estoppel is wise but whether it is intended by the legislature.

—— U.S. at ——; 111 S. Ct. at 2169. After analyzing the provisions of the Age Act, the Court concluded that they carried an implication against preclusion which overrode any common-law rule that would otherwise apply. —— U.S. at ——; 111 S. Ct. at 2171. Likewise, Section 10(c) implicitly displaces the common law exhaustion doctrine with respect to actions under the APA.

D. This Court's Decisions Do Not Support the Government's Construction of Section 10(c)

The government contends that Mr. Darby is "mistaken" in relying upon this Court's statement, in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-85 (1987), that Section 10(c) relieves parties from the requirement of petitioning an agency for rehearing before seeking judicial review. The government attempts to distinguish that decision on the grounds that it involved a petition for reconsideration, as opposed to an intra-agency appeal. Resp. Br. 23. This purported distinction is refuted by the language of Section 10(c), itself, which articulates an exhaustion rule equally applicable to "an appeal to superior agency authority" and to petitions "for any form of reconsideration."

Likewise, the government seeks to distinguish the Court's decision in *Levers v. Anderson*, 326 U.S. 219 (1945) because it involved a motion for rehearing, rather than an appeal to higher authority. Yet the government cannot gainsay that this decision held that a litigant need not exhaust an administrative remedy that is permissive in nature.

Striving vainly to come up with some countervailing authority, the government cites the decisions in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) and *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967). Resp. Br. 21-22. However, the government's reliance on these cases is completely misplaced.

Standard Oil did not purport to explore the contours of the exhaustion doctrine; rather, it addressed the need for finality as the threshold requirement for judicial review of agency action. In that regard, the Court noted that a litigant's exhaustion of available administrative remedies does not necessarily render an agency's action final. This holding underscores that it is the finality requirement, not the exhaustion doctrine, which provides the primary assurance against premature judicial review of agency decisionmaking. *Standard Oil* does not bar judicial review here since the finality of the contested agency actions is undisputed.

Toilet Goods also is inapposite since that case dealt with the distinct issue of ripeness, not exhaustion. The distinction between the two doctrines is subtle, but vital.

> The ripeness doctrine . . . has a different focus and a different basis from exhaustion. The exhaustion doctrine emphasizes the position of the party seeking review; in essence, it asks whether he may be attempting to short circuit the administrative process or whether he has been reasonably diligent in protecting his own interests. Ripeness, by contrast, is concerned primarily with the institutional relationships between courts and agencies, and the competence of the courts to resolve disputes without further administrative refinement of the issues.

Ernest Gellhorn & Barry B. Boyer, *Administrative Law and Process* 318-19 (2d ed. 1981).

In *Toilet Goods*, the Court concluded that the litigants should be required to "exhaust" an additional administrative process *not* because there had been any procedural

default by the litigants, but rather to ripen the issues and thereby facilitate subsequent judicial review. 387 U.S. at 166. In contrast, the issue presented in this case is exhaustion, not ripeness. There is no question that the challenged agency actions were ripe for judicial review; the only issue is whether Mr. Darby satisfied the procedural preconditions to review. As noted above, Mr. Darby contends that Section 10(c) disposes of the exhaustion issue presented here, but he does not contend that Section 10(c) governs ripeness issues. There is no conflict between *Toilet Goods* and the construction of Section 10(c) which Mr. Darby propounds.

As a last resort, the government makes a futile attempt to analogize this case to decisions of this Court involving the doctrine of primary jurisdiction, the abstention doctrine, and claims arising on Indian reservations. Resp. Br. 25-27. The doctrine of primary jurisdiction is akin to the ripeness doctrine in that it defers judicial review pending administrative resolution of certain issues, not because of a procedural default by the litigant but because of the agency's special competence. *See, e.g., Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). That doctrine is inapposite here for the same reason as is the ripeness doctrine. The government's other analogies do not involve judicial review of federal administrative action, and seek to compare apples to oranges insofar as the concept of "exhaustion" is concerned.

E. Mr. Darby's Construction of Section 10(c) Would Not Disrupt Orderly Judicial Review of Agency Action

The government contends unpersuasively that Mr. Darby's construction of Section 10(c) would enable litigants to bypass their administrative remedies altogether. Resp. Br. 28-29. However, judicial review under the APA is limited to the administrative record made before the agency, not some new record made in the reviewing court. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Moreover, it is a long-settled

rule that courts reviewing agency action will not entertain arguments which were not raised before the agency. *See United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952). The government is forced to concede that this latter rule would preclude most attempts to bypass agency processes. Nonetheless, it speculates that the rule may not be an "insuperable obstacle" if a party filled the administrative record with "preliminary submissions . . . or other materials bringing the party's arguments to the agency's attention." Resp. Br. 28 n.12. But, the government never explains how a party could create such an administrative record without participating in the agency's process, and its speculations are unfounded.

The foregoing limitations, together with the doctrines of finality, ripeness, and primary jurisdiction, provide federal courts with ample safeguards to prevent persons from short-circuiting administrative processes before seeking judicial relief. The courts need not resort to the creation of exhaustion requirements that clash with the provisions of Section 10(c) and that deprive litigants of judicial review promised to them by Congress.

The government's further complaint with Mr. Darby's construction of Section 10(c) would permit haphazard review of a variety of preliminary agency decisions cannot be taken seriously. The obvious remedy is for agencies to amend their rules to require exhaustion of administrative appeals in conformance with Section 10(c), *not* for federal courts to impose judicial exhaustion requirements in contravention of Section 10(c).

F. The Fourth Circuit's Decision Violates Section 10(c) and Settled Principles of Exhaustion

In conclusion, the government argues that "settled principles limiting judicial review of agency action barred adjudication of [Mr. Darby's] claims." Resp. Br. 36-37. The truth is exactly the opposite. It has long been settled that litigants need not exhaust permissive administrative

remedies before seeking judicial review. *See Prendergast v. New York Tel. Co.*, 262 U.S. at 48; *Levers v. Anderson*, 326 U.S. 219 (1945). It is also settled that application of the judicially-created exhaustion doctrine is committed to the sound discretion of the trial court. *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 426 n.8 (1968). The district court, after careful consideration, found three distinct reasons not to dismiss Mr. Darby's action on exhaustion grounds. In closely analogous circumstances, this Court found no abuse of discretion when a district court proceeded to review an agency's decision. *United States v. Abilene & S. Ry.*, 265 U.S. at 280-82. Accordingly, the Fourth Circuit's decision to reverse the district court and deprive Mr. Darby of any judicial recourse is insupportable under "settled principles" of exhaustion, even without regard to Section 10(c) of the APA.

Section 10(c), however, cannot be disregarded since it codifies the exhaustion doctrine—and controls the resolution of exhaustion issues—with respect to APA actions in federal courts. The statute's insistence that exhaustion requirements be spelled out in advance for all to see is sound policy and fully consonant with Congress's purpose —to remove obstacles to judicial review of agency actions. *See Bowen v. Massachusetts*, 487 U.S. at 904. Moreover, it is the law of the land. The Fourth Circuit's decision conflicts with the express will of Congress as articulated in Section 10(c) and effectively nullifies that statute. It derogates from the obligation of federal courts to exercise the jurisdiction which Congress has given them, and, in the case of the APA, to protect citizens such as Mr. Darby from unlawful and abusive agency actions.

CONCLUSION

The judgment of the court of appeals should be reversed and the judgment of the district court, granting relief to Mr. Darby, should be affirmed.

Respectfully submitted,

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